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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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AMERITECH CORPORATION, ET AL.

*v.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF FOR THE PETITIONERS

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In its response to the Bell companies' petition for a writ of certiorari, the United States agrees that this case has many characteristics that make it certworthy under traditional standards. The United States clearly states (Br. 13) that the "court of appeals erred by holding that Section VIII(C) of the decree, rather than the public interest standard, governs BOC motions to modify line-of-business restrictions that are supported by the government, if AT&T objects." The United States acknowledges (Br. 18) that "the decree at issue significantly affects competition and innovation in telecommunications and related industries" and that "unnecessary restrictions on vertical integration and entry into important and technologically critical markets may undercut the public interest in competition." The United States also confirms (Br. 2-3, 18-19) that a number of waiver requests significantly affecting competition in these "critical markets" have arisen in the past and are likely to arise in the future. The United States further declares that AT&T "has an economic interest" in opposing these waiver requests because it will "benefit from the anticompetitive effects of continuing restrictions on BOC entry that no longer serve the public interest in competition" (Br. 16), that the choice between the public interest standard and the more stringent test of Section VIII(C) may well be "determinative" of those waiver requests (Br.

19 n.16), and that Supreme Court "review of the question presented"—which concerns the standard for modification—"might be warranted in some future case" (Br. 20).

Nonetheless, the United States is "not persuaded" that review of the question presented is necessary at this time. Br. 13, 17. The reservations expressed by the United States, however, are insubstantial. They do not detract from the compelling need for review by this Court at this time. Nor do the more extreme and self-interested arguments presented by AT&T and MCI provide any reason to delay review of this compelling and important question of antitrust consent decree jurisprudence.

1. The United States explains in some detail (Br. 13-17) why the decision below is both wrong and important. Under established legal principles incorporated in this decree, if both the United States and the antitrust defendants subject to a restriction consent to a modification of that restriction, the district court must accept the modification provided it falls within the reaches of the public interest. The posture of this particular case—in which the pre-decree defendant has been split into parts, with different post-divestiture obligations under the decree—does not change those established principles. Consent is still a matter between the United States and the parties bound by the restriction.

Here, as the United States notes (Br. 15), "[o]nly the BOCs are bound by [the line-of-business] restrictions; post-divestiture AT&T is not so bound and, indeed, competes in markets from which the decree bars the BOCs." It follows that only "the BOCs —and not AT&T—stand in the position of the antitrust defendant for purposes of determining whether a modification of the restrictions applicable to them is consensual." *Ibid.* Certainly, nothing in the language or history of the decree indicates otherwise. In particular, "[t]here is no evidence that the government or the pre-divestiture Bell System (which included the BOCs) desired to afford post-divestiture AT&T special rights to oppose modification of restrictions that did not apply to it, much less evidence that there was a meeting of the minds on the point." *Id.* at 16. To the contrary, the United States would never have agreed to the decree if AT&T had been given such an extraordinary veto power. See Pet. 21. Because AT&T has an "economic interest" in maintaining the restrictions, granting AT&T the ability to block modifica-

tions that the United States concludes are pro-competitive would interfere with the ability of the United States to "represent[] the public interest in competition in government antitrust proceedings." U.S. Br. 16-17.[1]

Despite this strong argument for review, the United States suggests (Br. 17) that the court of appeals' holding may not be certworthy because it is "based squarely on its interpretation of the terms of the MFJ" and thus "establishes no clear precedent for other multiparty decrees." That is not correct. As the United States itself acknowledges (Br. 13-14, 16 n.15), although the court of appeals purported to base its decision on sections III and VII of the decree, neither section III nor section VII says anything "about the standard governing decree modifications." Both provisions are

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[1] The cases cited by AT&T (Opp. 17-18 nn.15-16) to support its supposed veto power are not on point. All but one involved efforts by the Department (or other decree parties) to *increase* decree restrictions on a defendant over the express objection of that defendant. See, *e.g.*, *United States Gypsum Company* v. *United States*, 352 U.S. 457 (1957); *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); *United States* v. *International Harvester*, 274 U.S. 693 (1927); *United States* v. *RCA*, 46 F. Supp. 654 (D. Del. 1942). None of these cases has any bearing on the standard of review in cases where both the government and the defendants subject to a particular restriction agree that it should be modified or removed.

The only case remotely on point is *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941), which supports the position taken by the United States and the Bell companies. In that case, the defendant agreed to a consent decree forbidding it to engage in predatory conduct against Panhandle Company and expressly granting Panhandle a right to intervene to enforce that commitment. Subsequently, the government and the defendant agreed to modify the decree and the district court granted the modification without permitting Panhandle to be heard. The Supreme Court held that Panhandle had "standing" to argue against the modification in district court (*id.* at 508). Significantly, however, the Court went on to state that the "public interest" test would apply to the modification on remand, notwithstanding Panhandle's objection (*id.* at 509). Thus, it is clear that mere *standing* to object does not affect the public-interest *standard* of review when both DOJ and the party subject to the restriction agree to its modification. See Pet. 9 n.6.

simply standard boilerplate in consent decrees. See Pet. 9 n.5. Not a word in either suggests that each party is given veto power over modification of the separately enforceable rights and obligations of distinct parties. AT&T's power to act as spoiler arises, according to the court, solely because of its status as a decree party—a status it shares with thousands of other parties to consent decrees who might find it in their private interest to obstruct modifications in consent decrees applicable to other defendants.[2]

Thus, the decision below would plainly apply to "other multi-party decrees." The federal government regularly enters into multi-party decrees not just in antitrust cases, but in such other contexts as civil rights, environmental enforcement, and pension litigation. See Pet. 16 n.11. Under the majority's reasoning in this case, every modification agreement between the government and an enjoined decree party could potentially be subject to an effective veto (through an elevated standard of review) by other parties.[3]

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[2] AT&T suggests (Opp. 14) that the proposed modification would "infringe" upon its specific rights under the decree by "adversely affect[ing]" the value of assets that AT&T received at the time of divestiture. That argument is baseless. None of the interexchange assets that AT&T was given at divestiture will be transferred as a result of the proposed modification. What AT&T is really saying is that it has a reliance interest in decree restrictions that have come to favor it at the expense of its competitors. But no one can reasonably rely on restrictions in a dynamic decree that was intended to be modified in light of market and technological developments. See *United States* v. *Western Elec. Co.*, 900 F.2d 283, 296 n.13 (D.C. Cir. 1990) (*Triennial Review Opinion*). In this respect, AT&T is in the exact same position as MCI or any other industry incumbent seeking to block new competitive entry.

[3] AT&T suggests (Opp. 16) that it would not be able to block "truly procompetitive line-of-business modifications" because relief is available under section VIII(C). See also MCI Opp. 9. But section VIII(C) requires the BOCs to prove, not just that the relief is procompetitive and in the public interest, but also that there is "no substantial possibility" that they could "impede competition" in the market they are seeking to enter. The question of the proper standard of review only arises when, as here, the Department of Justice has concluded that a modification is procompetitive and in the public interest, but the district court (per Judge

In any event, even if the United States were correct, and the holding below were limited to this particular decree, with no ramifications beyond it, certiorari would still be warranted because of the extraordinary public importance of this decree. The MFJ controls most aspects of the telecommunications industry—an industry that constitutes the nerve center of the U.S. economy. The fate of this industry will help determine the Nation's technological competitiveness well into the 21st Century. Yet, if the decision below is allowed to stand, future developments will be held hostage to AT&T's narrow competitive advantage. The consent decree will have been turned into a massive instrument of protection for the benefit of the industry giant, against new competition and new technologies.[4]

2. While not disputing the fundamental importance for the U.S. economy of the proper interpretation of this decree, the United States suggests (Br. 17) that in two respects "the scope of the court of appeals' ruling is unclear" and, therefore, may not be as harmful as initially appears. First, the United States notes (Br. 17-18) that the court below "limited its holding to the modifications of the decree's line-of-business restrictions, expressly declining to decide what standard would apply to modifications of other provisions." But this is a limitation without significance. All the important questions concerning modification of the decree relate to the line-of-business restrictions. It is precisely here—where AT&T dominates markets from which the Bell companies are excluded—that the decision below matters. Section II(D), which contains the line-of-business restrictions, is the battleground

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Harold Greene) has concluded that the more stringent test of section VIII(C) has not been met. The difference in standards, as DOJ points out (Br. 19 n.16), will often be outcome-determinative.

[4] MCI argues (Opp. 8-10) that AT&T is entitled to "the benefit of [its] bargain" even if the result is anticompetitive. But as already noted (pp. 2-3, *infra*; Pet. 19-23) neither the language nor history of the decree suggests that AT&T managed to extract such a Faustian compact from the United States.

on which AT&T continuously fights to protect its competitive turf.[5]

Second, the United States points out (Br. 18) that the instant case involves a BOC motion to modify the decree that was supported by the United States. The United States suggests (*ibid.*) that the court of appeals might still "hold the public interest standard applicable where the United States moves under Section VII for a line-of-business modification (sought or consented to by the BOCs)."

We wish this were true, but it seems to be merely what Samuel Johnson (speaking of second marriages) called "the triumph of hope over experience." The court below, in fact, specifically foreclosed any suggestion that the result would have been different if the single word "movant" had replaced "supporting respondent" on the government's brief. The court held that "if AT&T opposes a line-of-business modification, then DOJ's support, *in whatever form*, does not relieve the Companies from meeting the section VIII(C) test." Pet. App. 15a (emphasis added). In explaining this holding, the court cited two prior cases, in one of which DOJ offered merely "support for the proposal," while in the other DOJ "formally moved for a waiver." *Ibid.* In both cases, AT&T's opposition was deemed sufficient "to trigger the more stringent section VIII(C) standard." *Ibid.*

In short, there is no point in waiting for another D.C. Circuit decision to decide whether the holding below will "significantly impede the government's ability to carry out its responsibility to

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[5] MCI also argues that the petition is premature, but for a different reason. MCI suggests (Opp. 7) that a preliminary question—whether the public interest standard applies even if all parties, including AT&T, support the modification—may still come before the Court. But the affirmative answer given to that question by the court of appeals is so obviously correct and in line with established precedent (see Pet. 21-22), that this Court has already twice declined MCI's invitation to review it, see *MCI* v. *United States*, 111 S.Ct. 283 (1990); Order, *American Newspaper Publishers Ass'n* v. *United States*, No. A-267 (Oct. 30, 1991), and will undoubtedly do so a third time when the six-year information services proceeding is finally brought to a close.

ensure that the decree serves the public interest in competition." U.S. Br. 18. The last shoe has already dropped, whether the United States has heard it or not.[6]

3. Finally, the United States suggests (Br. 13, 18-19) that there is no "pressing need at this time" for review of the question presented because the underlying waiver request itself is "of limited practical importance in comparison with the other issues that may arise under the decree." Should the issue arise again in a more important context, as where the United States seeks to remove the equipment manufacturing restriction, then, the United States says (Br. 18-19), "an issue warranting review by this Court might be presented."

But the importance of a legal question is not dependent on the specific context in which it arises. This Court is being asked to decide the standard of review for *all* waiver requests—from the minor to the earth-shaking—that are supported by both the restricted party and the United States. The Court is not being asked to review the competitive merits or practical implications of the CCS waiver. The United States admits that the legal question is significant enough to warrant review—sometime. But since the issue was fully briefed and decided below by the only court that has jurisdiction over the MFJ, and since resolution of the issue has nothing whatever to do with the specifics of the particular waiver

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[6] By contrast to the United States and MCI, AT&T makes a sort of "laches" argument, suggesting that the United States and the Bell companies have already waited too long to raise this issue under the decree. AT&T Opp. 14-15. But the court of appeals had expressly left this question open in its *Triennial Review Opinion*, 900 F.2d at 294 n. 12, as AT&T itself is forced to acknowledge. AT&T Opp. 8 n.8. The court of appeals has now decided the issue on the merits (Pet. App. 13a-24a), and it is ripe for review in this Court.

Equally meritless is AT&T's contention (Opp. 21) that Supreme Court review should be denied because the Bell companies did not seek *en banc* review in the D.C. Circuit. *En banc* review is not a prerequisite to Supreme Court review and was not practicable here in any event, since Rule 35(a) of the Federal Rules of Appellate Procedure requires a majority vote of all active judges regardless of recusals.

request, denial of certiorari will only prolong the error and perpetuate the anticompetitive effects of the decision below. Nothing is to be gained by waiting for a more "important" waiver request.[7]

Since the decree's implementation in 1984, there have been literally hundreds of requests to modify the decree or grant waivers of the line-of-business restrictions. Because of elaborate briefing and protracted processing by the Department of Justice, these requests typically take years even to reach the district court. Additional years of judicial review are then required. Years may expire before this issue reaches this Court again in another context.

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[7] It is ironic that AT&T, which has at every step fiercely resisted the requested relief, now states (Opp. 12) "that the underlying dispute has little practical significance." In any event, not even AT&T suggests that the specific modification at issue here is moot. There are still numerous LATAs, particularly in rural areas, where the Bell companies do not plan to install CCS facilities, because to do so would be prohibitively expensive. The ruling below will deny the customers in those areas access to the advanced services that CCS makes possible. Moreover, even in LATAs with CCS facilities, interexchange carriers will be denied the opportunity to receive CCS messages on a centralized basis. See *Memorandum of the United States* at 2 (D.D.C. May 12, 1989) (C.A. J.A. 672) (The construction and operation of CCS facilities in every LATA "would impose substantial inefficiencies and unnecessary costs on interexchange carriers—especially smaller carriers—as well as the BOCs, thereby hampering the implementation of * * * CCS and its attendant public benefits.").

AT&T argues (Opp. 22) that "transitional waivers" could solve all these problems. But the United States made a considered judgment that piecemeal relief would embroil the parties and the courts in a great deal of delay and wasteful litigation over case-by-case waivers and would be less effective than a general waiver in achieving vigorous competition and economic efficiency. *Memorandum* at 23 (C.A. J.A. 693). Moreover, AT&T's proposal does not even address the plight of smaller interexchange carriers. AT&T's insistence on a form of waiver that is most beneficial to it and least conducive to effective competition is a telling reminder of why the Department of Justice rather than AT&T must be entrusted with the responsibility for protecting the public interest under this antitrust decree.

Meanwhile, the Department of Justice and the lower courts will be applying the wrong standard and a huge amount of potential new competition will be held hostage to AT&T's opposition. Only this Court will be able to correct the error and then only after lengthy delay and significant uncertainty and dislocation in the industry.

In a high-tech industry like telecommunications, delays of this sort are competitively devastating. AT&T knows that it cannot keep the Bell companies out of its markets indefinitely. Its goal is delay, and if the Court waits for another case to correct the court of appeals' erroneous decree interpretation, AT&T will have achieved all it could hope for. A vivid example is provided by the Bell companies' pending waiver to provide mobile services across LATA boundaries. AT&T, through its planned acquisition of McCaw, will be a direct competitor of the Bell companies in this field. AT&T is not bound by the LATA restrictions and is trying to block relief for the Bell companies to retain a competitive advantage. So far, AT&T is succeeding. Although it was filed in December 1991, that waiver is still mired in proceedings before the Department of Justice, despite the fact that the Department has been on record favoring this relief since 1987. Judge Greene has previously expressed his opposition to the requested relief; thus, if the VIII(C) test—which gives wide latitude to the district court—is applied, lengthy further delays are likely in the courts, all to the detriment of consumers who would benefit from head-to-head competition.

Absent this Court's intervention, the decision of the D.C. Circuit—which is the only court of appeals with jurisdiction over MFJ issues—"will have a debilitating effect" (*Parker* v. *Flook*, 437 U.S. 584, 587 (1978)) on the telecommunications industry and impair the sound and efficient administration of the decree. As the United States itself observed in 1982, when calling for prompt affirmance by this Court of the original decree, uncertainty about the decree would have "a broad and significant adverse impact on the telecommunications industry, on related industries * * * and thus on the public in general." *U.S. Motion to Affirm* at 12, *Maryland* v. *United States*, No. 82-952 (Dec. 22, 1982).

When all is said and done, the United States refrains from recommending that certiorari be granted because of its fanciful

hope that the court of appeals will effectively overrule its decision by making the standard of review turn on whether the government is a movant as opposed to a supporting respondent. Since there is no basis for that hope, there is no basis for delaying further review, at great cost to the development of competition in this critical industry. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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